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No. 92-220

In the Supreme Court of the United States

OCTOBER TERM, 1992

MILDRED BANKS, PETITIONER

v.

UNITED STATES POSTAL SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's claim of handicap discrimination was subject to judicial review.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is unpublished, but the judgment is noted at 936 F.2d 572 (Table).

JURISDICTION

The court of appeals entered its judgment on June 24, 1991. On September 26, 1991, Justice Stevens granted an extension of time within which to file a petition for a writ of certiorari to and including November 6, 1991. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was hired by the United States Postal Service in 1967 as a substitute distribution clerk. Petitioner remained in that position until 1976, when she was the successful bidder for a position as an optical character reader operator. On January 17, 1977, petitioner injured her left arm and shoulder while on duty. She was examined and treated at a clinic that day. On February 18, 1977, petitioner injured her right hand and shoulder; again, she was examined and treated the same day. On May 19, 1977, petitioner injured her back while lifting mail trays. She was transported to the hospital, where she was diagnosed as suffering from a lumbar sprain and released. Pet. App. A1-A2.

Petitioner did not return to work until June 2, 1977. Thereafter, petitioner was absent from work from June 15 to June 20, 1977; from August 23 to August 31, 1977; from September 27 until October 20, 1977; and from November 16 to December 1, 1977. She returned to work on December 1, 1977, but reinjured her back and stopped reporting for work. In all, petitioner failed to report for duty on approximately forty-two occasions in a four and one-half month period. On December 29, 1977, the Postal Service sent petitioner a Notice of Removal stating that she was being removed from her position because of her poor attendance record. Pet. App. A2-A3.

Petitioner, who is a black woman, contacted an equal employment opportunity (EEO) counselor. On January 16, 1978, petitioner filed a formal EEO complaint charging that the Postal Service had discriminated against her on the basis of race and gender by failing to provide prompt medical treatment for her alleged work-related back injury and by denying her request for permanent light duty status. In March

1978, petitioner filed a second EEO complaint charging that the Postal Service's December, 1977, notice of removal was based on race and gender discrimination. Pet. App. A3. Following a hearing, the EEOC found no discrimination. The Postal Service adopted the EEOC's findings in a final agency decision. *Id.* at A4.

Petitioner also filed a grievance challenging her removal pursuant to the collective bargaining agreement. The grievance was settled on July 28, 1978. Under the terms of the settlement, petitioner was reinstated and her discharge was converted to a disciplinary suspension without pay from the effective date of her removal to the date of her reinstatement. Pet. App. A3-A4. The settlement provided that petitioner "must meet the attendance requirements of the Postal Service and work at her regular job in a full duty status," and further provided that petitioner's "failure to abide from the above will lead to her discharge by the Postal Service." *Id.* at A3-A4.

Following her reinstatement, petitioner failed to report to work from September 18, 1978 to October 19, 1978, and failed to provide adequate medical documentation to excuse her absence. On October 19, 1978, the Postal Service issued a second Notice of Removal, effective November 30, 1978. Petitioner did not file a grievance or an EEO complaint challenging her removal. Pet. App. A4.

2. Petitioner brought this action in district court alleging that she had been discharged from the Postal Service because of her race and gender, in violation of Title VII, of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16. On September 29, 1983, petitioner amended her complaint to allege that the government had unlawfully discriminated against her on the basis of a handicap—*i.e.*, her back injury. Petitioner's final

amended complaint alleged, *inter alia*, violations of Title VII and the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified at 29 U.S.C. 701 *et seq.*). Pet. App. A4-A5.

Following a trial at which petitioner conceded that there was no evidence of race or gender discrimination, the district court granted the Postal Service's motion to dismiss. The district court found that "there [was] not a whisper of race or sexual discrimination in this case." Pet. App. B1. The court held that the Rehabilitation Act was inapplicable because petitioner's claim arose prior to Congress's creation of a private cause of action under that Act. *Id.* at B2. In addition, the court found that petitioner had not exhausted her administrative remedies. *Ibid.*

The district court further held that, even assuming petitioner's claim was subject to judicial review, she was entitled to no relief. The court found that there was nothing "to indicate that [petitioner's discharge] did not conform to applicable procedures," and "nothing to indicate that the actions [of the Postal Service] were arbitrary or capricious [or that] its decision in the final analysis was not supported by the substantial evidence." Pet. App. B3. Although petitioner contended at trial that she suffered from a herniated disc, the district court found that prior to her discharge she "went to as many as five doctors * * * [and] the most anyone ever said was it was a lumbar strain." *Ibid.*

3. The court of appeals affirmed. Pet. App. A1-A8. The court noted that petitioner had not raised a claim of discrimination on the basis of handicap until September 29, 1983. Pet. App. A6. Relying on this Court's decision in *United States* v. *Fausto*, 484 U.S. 439 (1988), the court held that petitioner, as a nonpreference eligible Postal Service employee, had

no nonstatutory right to judicial review of an adverse personnel decision of the Postal Service under the Civil Service Reform Act of 1978. Pet. App. A7-A8. The court thus concluded that the district court was without jurisdiction to review her discharge.

ARGUMENT

1. Petitioner alleged that the Postal Service discriminated against her on the basis of a handicap, in violation of Section 501 of the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 390 (codified at 29 U.S.C. 791). In 1978, Congress amended the Rehabilitation Act of 1973 to create a private right of action for claims of discrimination under Section 501. Rehabilitation, Comprehensive Services and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, Tit. I, § 120(a), 92 Stat. 2982 (codified at 29 U.S.C. 794a(a)(1)). See *Counts* v. *United States Postal Serv.*, 631 F.2d 46, 47 (5th Cir. 1980). The 1978 amendments took effect on November 6, 1978; petitioner was removed from her position on November 30, 1978. Consequently, petitioner had a private right of action under the Rehabilitation Act.

The amendments to the Rehabilitation Act "conferr[ed] Title VII rights and remedies on litigants alleging employment discrimination based on a handicapping condition." *Counts*, 631 F.2d at 47-48 (footnote omitted). Petitioner, like other federal employees seeking a Title VII remedy, was therefore required to exhaust her administrative remedies before seeking relief from the federal courts. *Boyd* v. *United States Postal Serv.*, 752 F.2d 410, 412 (9th Cir. 1985); *McGuinness* v. *United States Postal Serv.*, 744 F.2d 1318, 1320 (7th Cir. 1984); *Smith* v. *United State Postal Serv.*, 742 F.2d 257, 262 (6th Cir. 1984); *Prewitt* v. *United States Postal Serv.*, 662 F.2d 292, 303 (5th

Cir. 1981); 29 C.F.R. 1613.709(c). Petitioner never brought her claim of handicap discrimination to the attention of the EEOC. Instead, petitioner raised an allegation of handicap discrimination for the first time in 1983, in her amended complaint in the district court. Because petitioner failed to exhaust her administrative remedies, her claim of handicap discrimination was not subject to judicial review under the Rehabilitation Act.[1]

Petitioner contends (Pet. 23-25) that her two EEO complaints should be deemed to satisfy the administrative exhaustion requirement. But those complaints alleged only that the Postal Service's first Notice of Removal was based on race and gender discrimination. Although petitioner's EEO complaints were pending when Congress enacted the 1978 amendments to the Rehabilitation Act, neither complaint alleged discrimination based on handicap. If petitioner wished to raise an allegation of handicap discrimination, she was required to notify the EEOC that she intended to include such an allegation in her pending complaints. See 29 C.F.R. 1613.709(c) ("[A] complainant may request an agency to process allegations of handicap discrimination which had been filed as a discrimination complaint or as a grievance * * *. Such requests for processing of allegations of handicap discrimination must be brought to the attention of the agency EEO counselor not later than 180 days

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[1] We agree with petitioner that judicial review of her claim of handicap discrimination was not precluded by the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 (codified in various sections of 5 U.S.C.). Petitioner's claim arose on November 30, 1978. See Pet. App. A4. The CSRA did not become effective until January 11, 1979, and Congress did not intend the CSRA to have retroactive effect. See 5 U.S.C. 1101 note; 5 C.F.R. 1201.191(b) (1979).

from the publication of this subsection."). Because petitioner did not notify the EEO officer that she was alleging handicap discrimination, the EEOC properly investigated only the allegations of race and gender discrimination that she alleged.

In addition, petitioner failed to satisfy the exhaustion requirement because her EEO complaints concerned only the Postal Service's first Notice of Removal. That Notice of Removal was later withdrawn as part of a settlement agreement between petitioner and the Postal Service. Petitioner was discharged as a result of the Postal Service's second Notice of Removal. Petitioner never filed an EEO complaint challenging the second Notice of Removal on any ground.

2. Petitioner contends (Pet. 30) that she has a nonstatutory right to judicial review of her claim of handicap discrimination, regardless of her lack of compliance with the Rehabilitation Act. It is well settled, however, that the Rehabilitation Act provides the exclusive remedy for claims of handicap discrimination brought by federal employees. See, *e.g.*, *Boyd*, 752 F.2d at 413; *McGuinness*, 744 F.2d at 1322.

In any event, even if "nonstatutory review" of petitioner's claim of handicap discrimination were available, it would be "narrowly limited to an inquiry as to whether the Postal Service substantially complied with applicable procedures, whether its actions were arbitrary or capricious, and whether its decision was supported by substantial evidence." Pet. App. A7 (quoting *Neal* v. *United States Postal Serv.*, 468 F. Supp. 958, 961 (N.D. Utah 1979)). The district court reasonably concluded that the Postal Service's actions met that standard of review. Pet. App. B3. Consequently, the result in this case would be no

different if petitioner's claim were subject to non-statutory review.

Finally, the question presented in this case is of no continuing significance. It is now well settled that the Rehabilitation Act provides the exclusive remedy for claims of discrimination based on handicap by federal employees. Cases concerning claims of handicap discrimination arising prior to the 1978 amendments to the Rehabilitation Act are increasingly rare. Accordingly, no further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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